(1)

Supreme Court, U.S.
FILED

NO. 93-2067

JUN 22 1994
OFFICE OF THE CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1994

DEWAN WHITE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

RASHAUN B. LAWRENCE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

KIMBALL R. ANDERSON *
GERALD C. PETERSON
BRUCE R. BRAUN
MARIE A. LONA
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
Attorneys for Petitioners

MARIA WOLTJEN
CHICAGO LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER THE LAW, INC.
185 North Wabash, Suite 2110
Chicago, Illinois 60601
(312) 630-9744
Attorneys for Petitioners

* Counsel of Record

38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Illinois Supreme Court err in refusing to apply the strict scrutiny test in determining whether the public housing provision of the Illinois Juvenile Transfer Act denies African-American children equal protection under the Fourteenth Amendment to the United States Constitution?

2. Did the Illinois Supreme Court err in holding, as a matter of law, that Petitioners' valid statistical evidence — that 100% of the juveniles affected by operation of the Act at issue are African-American — did not "ripen into proof" of discriminatory intent?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE UNSETTLED QUESTIONS OF FEDERAL LAW REGARDING THE PROPER LEVEL OF CONSTITUTIONAL SCRUTINY TO APPLY WHEN ENHANCED PENALTY STATUTES INEVITABLY AND UNDENIABLY HAVE A GROSS DISPARATE IMPACT ON RACIAL MINORITIES	6
II. THIS COURT ALSO SHOULD GRANT THE WRIT TO RESOLVE UNSETTLED QUESTIONS OF FEDERAL LAW REGARDING THE EXTENT TO WHICH COURTS CAN RELY ON STATISTICAL EVIDENCE OF DISPARATE IMPACT ON RACIAL MINORITIES IN ENHANCED PENALTY CASES AS PROOF OF DISCRIMINATORY INTENT	10
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page
American Nurses Ass'n v. State of Illinois, 783 F.2d 716 (7th Cir. 1986)	11
American Ship Building Co. v. NLRB, 380 U.S. 300 (1965)	12
Batson v. Kentucky, 476 U.S. 79 (1986)	11
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, ___ U.S. ___, 113 S. Ct. 2217 (1993)	11
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	12
Hazelwood School District v. United States, 433 U.S. 299 (1977)	12
Hills v. Gautreaux, 425 U.S. 284 (1976)	10
Hunter v. Underwood, 471 U.S. 222 (1985)	11, 12
McCleskey v. Kemp, 481 U.S. 279 (1987)	11
Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979)	9
Price v. Austin Independent School District, 945 F.2d 1307 (5th Cir. 1991)	10, 11
Rogers v. Lodge, 458 U.S. 613 (1982)	9
State v. Russell, 477 N.W.2d 886 (Minn. 1991)	5, 8
United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994)	5, 8, 9
United States v. Majied, 1993 WL 315987 (D. Neb. July 29, 1993), *rev'd sub nom. United States v. Maxwell*, ___ F.3d ___, 1994 WL 202727 (8th Cir. May 26, 1994)	9
United States v. Willis, 967 F.2d 1220 (8th Cir. 1992)	9
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	9
Washington v. Davis, 426 U.S. 229 (1976)	9, 12

Cases	Page
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	12

Constitution and statutes	Page
U.S. const. amend XIV	2, 3, 5, 6, 10, 11, 12, 13
21 U.S.C. § 841(b)(1)(A)(ii) (Supp. 1993)	7
21 U.S.C. § 860 (Supp. 1993)	7
28 U.S.C. § 1257(a)	2
705 ILCS 405/1-2 (1992)	2
705 ILCS 405/5-4(7)(a)	2, 3
705 ILCS 405/1-2(3)	2
705 ILCS 405/5-4(1) (1992)	2
ALA. CODE §§ 13A-12-250 & 13A-12-270 (1993)	6, 7
ALASKA STAT. § 11.71.030 (Supp. 1993)	7
ARIZ. REV. STAT. ANN. § 13-3411 (1994)	6
DEL. CODE ANN. tit. 16, § 4767 (1993)	6
FLA. STAT. ANN. § 893.13(1)(i)1 (West Supp. 1990)	7
HAW. REV. STAT. § 712-1249.6 (1993)	6
IND. CODE ANN. § 35-48-4-1 (Burns 1993)	7
IND. CODE ANN. § 35-48-4-7 (West 1994)	6
IOWA CODE ANN. § 124.401A (West 1994)	6
KAN. STAT. ANN. § 65-4127a (1993)	6
KY. REV. STAT. ANN. § 218A. 1411 (Michie/Bobbs-Merrill 1993)	7
LA. REV. STAT. ANN. § 40:981.3 (West 1994)	6
MASS. GEN. LAWS ANN. ch. 94C, § 32J (West 1994)	6
MINN. STAT. § 152.029 (1993)	7
MISS. CODE ANN. § 41-29-142 (1993)	6
MO. ANN. STAT. § 195.214 (Vernon 1993)	7
MONT. CODE ANN. § 45-9-109 (1993)	6

Statutes	Page
N.J. STAT. ANN. § 2C:35-7 (West 1994)	6
N.M. STAT. ANN. § 30-31-20 (Michie 1993)	6
N.Y. PENAL LAW § 220.44 (McKinney 1994)	6
OHIO REV. CODE ANN. § 2925.02 (Anderson 1993)	6
OR. REV. STAT. § 475.999 (1993)	6
P.R. LAWS ANN. tit. 24, § 2411a (1992)	6
S.C. CODE ANN. § 16-1-100 (Law. Co-op 1993)	7
V.I. CODE ANN. tit. 19, § 604 (1993).	6
VT. STAT. ANN. tit. 18, § 4237 (1993)	6
WIS. STAT. ANN. § 161.49 (West 1994)	6
WYO. STAT. § 35-7-1036 (1993)	6

Miscellaneous	Page
Etienne Balibar, "Class Racism" in *Race, Nation, Class* 204, 319 (1991)	12
Fagan, Jeffrey, *The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders*, National Institute of Justice, U.S. Dep't of Justice, 1991	7

No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 1994

DEWAN WHITE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

RASHAUN B. LAWRENCE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners Rashaun Lawrence and Dewan White respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this cause.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (Appendix "App." A, *infra*) is reported at 1994 WL 93484 (Ill. March 24, 1994). The order of the trial court (App. B, *infra*) is unreported.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on March 24, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. XIV

705 405/1-2(3)(b)

705 405/5-4(1)

705 405/5-4(7)(a)

The constitutional and statutory provisions involved are reprinted at Appendix C, *infra*.

STATEMENT OF THE CASE

Petitioner Rashaun Lawrence ("Rashaun") is an African American who was 16-years old when he was arrested and charged with possession and attempt to deliver a controlled substance one door away from where he lives in the Ida B. Wells housing project operated by the Chicago Housing Authority ("CHA"). (1 Lawrence CLR, p. 7.) Similarly, Petitioner Dewan White ("Dewan") is an African American who was 16-years old when he was charged with delivery of a controlled substance a few doors away from where he lives in a CHA project. (1 White CLR, p. 5.) Neither child was afforded the protections of Illinois' Juvenile Court Act.[1] Instead, both Rashaun

---

1 Children, those individuals under the age of 17, typically are afforded certain protections when they are accused of a criminal offense. Illinois has codified these protections in the Juvenile Court Act of 1987. 705 ILCS 405/1, *et seq.* The Juvenile Court Act guarantees Illinois children "a right to services necessary to [their] proper development" and shelters children from criminal prosecution until they reach 17 years of age. 705 ILCS 405/1-2(3)(b); 705 ILCS 405/5-4(1) (1992). When a child is charged with a criminal offense, an "adjudicatory hearing" is held which, unlike a criminal prosecution, must be conducted "in a spirit of humane concern" to promote the child's "moral, emotional, mental and physical welfare." 705 ILCS 405/1-2 (1992).

and Dewan were subject to the public housing provision of the Juvenile Transfer Act (hereinafter "Act"), 705 ILCS 405/5-4(7)(a), which denies Juvenile Court Act protections to 15- and 16-year olds charged with selling a controlled substance on or within 1,000 feet of public housing property. Children subject to the public housing provision automatically are transferred to the adult criminal court system — a system that focuses on punishment rather than guidance and rehabilitation. As a result of their transfer, Rashaun was charged with a non-probational Class X felony and Dewan was charged with a non-probational Class I felony. If the Act is upheld and these boys are convicted, Rashaun will be sent to adult prison for a mandatory term of 6 to 30 years. Dewan will be sent to adult prison for a mandatory term of 4 to 15 years. Along with Rashaun and Dewan (collectively "Petitioners"), 32 other children have been impacted adversely by the public housing provision of the Act from August 1991 through July 1992. All 34 children are African-American. (2 Lawrence CLR, p. G-6.) If they had been charged with the same controlled substance offenses in all-white neighborhoods, more than 1,000 feet from the public housing projects where they live, they would have been treated as juveniles subject to the protections and punishments of the Juvenile Court Act.

Petitioners moved to dismiss the charges against them on the basis that the public housing provision of the Act violated the Equal Protection Clause of the United States Constitution and the Illinois Constitution, and the trial court granted their motions to dismiss. (App. B at B-5-B-6; 1 Lawrence CLR, p. 47; 1 White CLR, p. 38.) The trial court found that all children subject to the Act are African Americans, that less than 2% of CHA residents are white, and that over 90% of CHA residents are African Americans. (App. B at B-3-B-4; 1 Lawrence CLR, p. 49; 1 White CLR, p. 36.)

The trial court considered the legislature's statements during the debates of the Illinois House and Senate which anticipated the discriminatory impact of the Act. For example, Representative Davis stated his concerns during the Illinois General Assembly's debate as follows:

> You're saying here . . . because this juvenile lives in or commits this crime in a public housing area, that he

> should be tried as an adult, but if he commits this crime . . . let's say in Bridgeport, he is not sentenced as an adult . . . I mean if you do it in Bridgeport, it's not as bad . . . what you're saying, they deserve . . . the criminals in public housing deserve a greater sentence than those from Bridgeport? . . . or the North Side of Chicago? . . . [A]re we going to legislate a different Criminal Code or a Penal Code for those who live in the public housing environment? That will be different than people that come from Elmhurst or the people that come from the Northside of Chicago. Crime is crime, Representative. . . . We cannot in this Body, decide that if you live in public housing and you commit a crime, that your sentence will be greater than those who don't live in public housing and commit a crime. You just can't do that. The judges will tell you, Sir, it's unconstitutional and discriminatory.

(1 White CLR, p. 63-64.)[2] Representative Williams remarked that "[t]he fact that we're going to be specializing in singling out a certain category of individuals . . . is just a shame. We shouldn't create special categories of crime for special citizens." (1 White CLR, p. 66.) Representative Morrow followed, stating:

> [I]f [a] young man happened to live in the projects, and not in Oak Lawn, he's going to receive double or triple the sentence that he did receive for the crimes that he did commit. Why should we single out someone who might be doing drug dealing, or some crime activity in a project . . . . Think about what you're doing here. Crime is crime, whether it's in Oak Brook, Oak Lawn, Robert Taylor Home, anywhere, crime is crime, and it should be treated as such.

(1 White CLR, p. 67.)

---

2 "Bridgeport," "Elmhurst," and "the Northside of Chicago" are white neighborhoods.

Based on the legislative history of the Act and the fact that 100% of the children affected by the operation of the Act are African Americans, the trial court found that the Act created a *de facto* racial classification and that a discriminatory intent could be inferred from the totality of the circumstances. Applying the strict scrutiny standard, the trial court found that the public housing provision of the Act violated the Equal Protection Clause of the United States Constitution as well as the Illinois Constitution. (App. B at B-5.)

The Illinois Supreme Court, however, reversed the trial court's decision stating that "the trial court erred by ruling that the provision created a *de facto* suspect classification." (App. A at A-8.) According to the Illinois Supreme Court, application of the rational basis test was proper and the Act passed muster under that test. (App. A at A-8.)

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to resolve unsettled questions of federal constitutional law in the context of increasingly popular state and federal enhanced penalty statutes that have an undeniable gross disparate impact on racial minorities. Unsettled is the fundamental question of whether lower courts should apply the strict scrutiny, or rational basis test, or some intermediate test when an enhanced penalty statute inevitably affects predominantly or exclusively a particular racial class. Contrast the decision of the Illinois Supreme Court below with the decision of the Minnesota Supreme Court in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991) (state statute that punished possession of "crack" cocaine more severely than possession of powdered cocaine held unconstitutional when statistics showed that over 95% of those arrested for possession of "crack" were African-American while almost 80% of those arrested for possession of powered cocaine were white), and with the decision of the United States district court in *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994) (disproportionate penalties for "crack" cocaine in the Federal Sentencing Guidelines violate the Equal Protection Clause of the United States Constitution). If neither the strict scrutiny nor rational basis test is appropriate in these types of cases, then this Court should grant the writ and establish an alternate heightened scrutiny test for use in these types of cases.

This Court also should grant the writ to resolve unsettled questions of federal law regarding whether the lower courts can rely on statistical evidence of disparate impact on racial minorities in enhanced penalty cases to infer discriminatory intent. This Court should craft a test, faithful to the purpose of the Equal Protection Clause, that permits lower courts to rely on compelling statistical evidence to infer discriminatory intent. Any other test, such as that employed by the Illinois Supreme Court below, denies equal protection in all cases in which the adversely affected racial class cannot produce the unproduceable smoking gun.

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE UNSETTLED QUESTIONS OF FEDERAL LAW REGARDING THE PROPER LEVEL OF CONSTITUTIONAL SCRUTINY TO APPLY WHEN ENHANCED PENALTY STATUTES INEVITABLY AND UNDENIABLY HAVE A GROSS DISPARATE IMPACT ON RACIAL MINORITIES

Increasingly in vogue with state and federal legislators are enhanced penalties for certain types of criminal offenses.[3] Florida,

---

3 Among the states with enhanced penalty statutes are Alabama, ALA CODE §§ 13A-12-250 & 13A-12-270 (1993); Arizona, ARIZ. REV. STAT. ANN. § 13-3411 (1994); Delaware, DEL. CODE ANN. tit. 16, § 4767 (1993); Hawaii, HAW. REV. STAT. § 712-1249.6 (1993); Indiana, IND. CODE ANN. § 35-48-4-7 (West 1994); Iowa, IOWA CODE ANN. § 124.401A (West 1994); Kansas, KAN. STAT. ANN. § 65-4127a (1993); Louisiana, LA. REV. STAT. ANN. § 40:981.3 (West 1994); Massachusetts, MASS. GEN. LAWS ANN. ch. 94c, § 32J (West 1994); Mississippi, MISS. CODE ANN. § 41-29-142 (1993); Missouri, MO. ANN. STAT. § 195.214 (Vernon 1993); Montana, MONT. CODE ANN. § 45-9-109 (1993); New Jersey, N.J. STAT. ANN. § 2C:35-7 (West 1994); New Mexico, N.M. STAT. ANN. § 30-31-20 (Michie 1993); New York, N.Y. PENAL LAW § 220.44 (McKinney 1994); Ohio, OHIO REV. CODE ANN. § 2925.02 (Anderson 1993); Oregon, OR. REV. STAT. § 475.999 (1993); Vermont, VT. STAT. ANN. tit. 18, § 4237 (1993); Wisconsin, WIS. STAT. ANN. § 161.49 (West 1994); Wyoming, WYO. STAT. § 35-7-1036 (1993); as well as Puerto Rico, P.R. LAWS ANN. tit. 24, § 2411a (1992); and the Virgin Islands, V.I. CODE ANN. tit. 19, § 604 (1993).

Alabama, Minnesota and Missouri, as well as Illinois, have adopted enhanced penalties for narcotics offenses committed near public housing projects. *See* ALA. CODE § 13A-12-270 (1993); FLA. STAT. ANN. § 893.13(1)(i)1 (West Supp. 1990); MINN. STAT. § 152.029 (1993); MO. ANN. STAT. § 195.218 (Vernon, 1994). In addition, the Federal Sentencing Guidelines and twenty-six states provide enhanced penalties for defendants convicted of selling certain controlled substances near public schools or playgrounds. *See* 21 U.S.C. § 860 (Supp. 1993); ALASKA STAT. § 11.71.030 (Supp. 1993); IND. CODE ANN. § 35-48-4-1 (Burns 1993); KY. REV. STAT. ANN. § 218A. 1411 (Michie/Bobbs-Merrill 1993). Some of these statutes, such as that adopted in Illinois, combine enhanced penalties with the transfer of juveniles to adult courts.[4] Likewise, the Federal Sentencing Guidelines and several states provide enhanced penalties for defendants convicted of selling "crack" cocaine rather than powder cocaine. *See* 21 U.S.C. § 841(b)(1)(A)(ii) (Supp. 1993); S.C. CODE ANN. § 16-1-100 (Law. Co-op 1993).

The reason for the proliferation of these types of statutes is clear. When citizens read in the daily newspapers and watch the nightly crime shows about drive-by shootings, gang warfare, brutal murders of children and elderly persons, they demand action. Legislators, feeling the pressure, respond by filling legislative hoppers with new crime bills, each one more draconian than before. The popular perception is that the public is willing to pay any price to control crime — even if it means abandoning traditional constitutional safeguards.

---

4 Strong public policy arguments have been raised against the juvenile transfer statutes with enhanced penalties for certain criminal offenses. Automatic transfer statutes transfer children solely on the basis of age and offense while ignoring their background and rehabilitative ability. These statutes basically strip the Juvenile Court judge of any discretion to rehabilitate a young first-time offender. Moreover, studies show that recidivism rates are higher for those children transferred to the adult court system compared to those children who remain in the juvenile court system. *See* Fagan, Jeffrey, *The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders*, National Institute of Justice, U.S. Dep't of Justice, 1991.

Historically, the abandonment of traditional constitutional safeguards in an effort to combat crime has impinged most severely on African Americans. The empirical evidence of this historical phenomenon is explained in detail in *United States v. Clary*, 846 F. Supp. 768, 774-82 (E.D. Mo. 1994), which we adopt by reference. Suffice it to add here that, although overt legislative racism is mostly a thing of the past, the disparate impact of new crime legislation on African Americans continues today—albeit in more subtle and discrete forms as evidenced by the public housing provision of the Illinois Juvenile Transfer Act.

The disparate impact on African Americans caused by enhanced penalties for certain types of criminal behavior has not gone unnoticed by the lower courts. Although the concern about the disparate impact is nearly uniform, the judicial treatment has been anything but uniform. The Illinois Supreme Court's treatment below is but one example. Despite the uncontroverted fact that 100% of the persons affected by the public housing provision of the Illinois Juvenile Transfer Act have been African-American children, the Illinois Supreme Court held that the rational basis test provided the appropriate mode of analysis and that the Act should be upheld because the court could think of some arguably rational purpose for the Act. (App. A at A-8.)

In contrast, the Minnesota Supreme Court, presented with evidence of a similar *de facto* racial classification, held unconstitutional a Minnesota statute that created enhanced penalties for possession of "crack" cocaine. *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). Evidence before the Minnesota Supreme Court showed that 95% of those arrested for possession of "crack" were African-American while almost 80% of those arrested for possession of powdered cocaine were white. In part because of unresolved questions of federal law, and for other obvious reasons, the Minnesota Supreme Court relied on the "Minnesota rational basis test" which involves a heightened level of scrutiny. *Id.* at 888.

The concern, confusion and disagreement in enhanced penalty cases is present at the federal court level as well. In *United States v. Clary, supra,* the district court after an extensive analysis of this Court's equal protection decisions applied the strict scrutiny test to

hold unconstitutional federal sentencing guidelines that enhanced penalties for possession of "crack" cocaine. 846 F. Supp. at 791. The district court relied on undeniable evidence of disparate impact on African Americans and a legislative debate that recognized the inevitability of the disparate impact that eventually occurred in the actual operation of the guidelines. *Id.* at 782-86. Other federal judges have concurred with this analysis. *See United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring) (concerned about the sufficiency of the record supporting the view that Congress had a sound basis to make a harsh distinction between powder cocaine and crack cocaine, particularly in light of the evidence of racial disparity in drug enforcement); *see also United States v. Majied*, 1993 WL 315987 at *4, 5 (D. Neb. July 29, 1993) (downward departure from Sentencing Guideline due to racially disparate impact on African Americans), *rev'd sub. nom. United States v. Maxwell*, __ F.3d __, 1994 WL 202727 (8th Cir. May 26, 1994).

To be sure, the various courts that have applied equal protection analysis to enhanced penalty statutes have cited, in talismanic fashion, this Court's decisions in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 276 (1979) (the "dispositive question, then is whether . . . [a] discriminatory purpose has, at least in some measure, shaped the [legislation]."); *Washington v. Davis*, 426 U.S. 229, 241 (1976) ("[t]he necessary discriminating racial purpose [need not] be express or appear on the face of the statute."); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) ("Determining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' "); and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977) (the legislative history "may be highly relevant, especially where there are contemporary statements by members of the decision-making body."). Equally true is that these decisions contain something for both sides of the debate regarding whether to apply the strict scrutiny, rational purpose, or "something-in-between" tests.

The Illinois Supreme Court below clearly erred in rejecting the strict scrutiny test in favor of the rational basis test despite the undeniable fact that the public housing provision of the Illinois

Juvenile Transfer Act, in operation, has affected exclusively African-American youth. Although facially neutral, the Act has created just what many Illinois legislators knew would happen before the Act was passed — namely a *de facto* racial classification. Everyone knew then, and knows today, that African-American children, to the extent that they are going to possess or sell controlled substances, are going to do so near where they live — and not in the predominantly white neighborhoods where they do not live. Everyone knew then, and knows today, that CHA residents are overwhelmingly African-American as a result of purposeful segregation practices (*see Hills v. Gautreaux*, 425 U.S. 284 (1976)). It was self-evident that the Juvenile Transfer Act would have a disparate affect on CHA children. Everyone knew then, and knows today, that white children possessing and selling the same drugs in their white neighborhoods would not be impacted by the Act, would not be transferred into adult court, and would not be sent to adult prison at ages 15 and 16 for lengthy minimum terms of incarceration. To apply the rational basis test in these kinds of cases makes the Fourteenth Amendment guarantee of equal protection to African-American children wholly illusory.

The Illinois Supreme Court's decision below should be reversed. Moreover, this Court should grant the writ to resolve unsettled questions of federal law regarding whether to apply the strict scrutiny test in enhanced penalty cases involving racially disparate impact.

II. THIS COURT ALSO SHOULD GRANT THE WRIT TO RESOLVE UNSETTLED QUESTIONS OF FEDERAL LAW REGARDING THE EXTENT TO WHICH COURTS CAN RELY ON STATISTICAL EVIDENCE OF DISPARATE IMPACT ON RACIAL MINORITIES IN ENHANCED PENALTY CASES AS PROOF OF DISCRIMINATORY INTENT

Although acknowledging that 100% of the juveniles affected by the public housing provision of the Illinois Juvenile Transfer Act have been African-American and that the members of the Illinois legislature had accurately predicted the Act's disparate impact, the Illinois Supreme Court below, relying on *Price v. Austin Independent*

School District, 945 F.2d 1307, 1319 (5th Cir. 1991), concluded "that if any inference of racial discrimination existed, it failed to ripen into proof." (App. A at A-8.) Without identifying what type of smoking gun evidence would suffice as proof of discriminatory intent, the Illinois Supreme Court made clear that it would draw no inference of discriminatory intent from statistics demonstrating that the statute exclusively affected African-American youth. The Illinois Supreme Court's refusal to rely on statistical evidence of disparate impact as proof of discriminatory intent is inconsistent with the approach adopted by this Court and the majority of other courts in other types of equal protection cases arising under the Fourteenth Amendment (*see, e.g., Hunter v. Underwood*, 471 U.S. 222 (1985)), but it is by no means totally unusual. *See, e.g., American Nurses Ass'n v. State of Ill.*, 783 F.2d 716, 722 (7th Cir. 1986). Little or no guidance regarding the proper approach exists in the context of enhanced penalty cases arising under the Fourteenth Amendment.

In other contexts, this Court has made clear that statistical evidence of disparate impact is relevant, and at times may alone prove discriminatory intent. For example, in the context of religious discrimination, this Court recently held unconstitutional ordinances prohibiting ritualistic animal sacrifices not for the primary purpose of food consumption. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S. Ct. 2217, 2228 (1993). This Court stated:

> It becomes evident that these ordinances target Santeria [a religious group] sacrifice when the ordinances' operation is considered. Apart from the text, the effect of the law in its real operation is strong evidence of its object.

See also McCleskey v. Kemp, 481 U.S. 279, 293 (1987) ("[s]tatistical proof normally must present a "stark" pattern to be accepted as the sole proof of discriminatory intent under the Constitution"); *Hunter v. Underwood*, 471 U.S. 222 (1985) (relevant statistical proof showed that the state definition of crimes involving "moral turpitude" disenfranchised a significantly greater percentage of African-American voters than white voters); *Batson v. Kentucky*, 476 U.S. 79 (1986)

(statistical evidence that a disproportionate number of African-American s were excused from jury service proved an Equal Protection Clause violation); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) ("[w]here gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination"); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 312 (1965) ("Thus where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced."); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (statistical evidence showed equal protection violation arising out of a racially neutral boundary reconfiguration that excluded approximately 400 black voters while retaining every white voter); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (statistics showed facially neutral law requiring a permit for laundries in a wooden building had the unconstitutional effect of closing 200 Chinese laundries while granting permits to all but one of 80 white applicants).

Without the ability to prove discriminatory intent with statistical evidence of disparate impact in enhanced penalty cases, a litigant seeking equal protection under the Fourteenth Amendment effectively is locked out of court. As Justice Stevens recognized in *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring), "[i]t is unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decision maker . . . ." Moreover, as this Court recognized in *Hunter v. Underwood*, *supra*, the difficulty of proving the intent of a large legislature is considerable. 471 U.S. at 228 ("When we move from an examination of a board of county commissioners . . . to a body the size of the Alabama Constitutional Convention of 1901, the difficulties in determining the actual motivations . . . increase."); *see also* Etienne Balibar, "Class Racism" in *Race, Nation, Class* 204, 319 (1991) ("Improper motives are easy to hide. . . . Moreover, where several decision makers are involved, proof of racially discriminatory motivation is even more difficult.").

In short, in a case like this one where the state's highest court does not question the reliability or validity of statistical evidence, and does not question the foreseeability of the disparate impact, but

nevertheless concludes that any inference of racial discrimination "failed to ripen into proof," the Fourteenth Amendment's protection against racial discrimination is entirely without substance and meaning. The Illinois Supreme Court's insistence on more "proof" without explaining what type of "proof" would be constitutionally acceptable, effectively deprived Petitioners of their constitutional right to equal protection.

The Illinois Supreme Court's decision below should be reversed. Moreover, this Court should grant the writ to provide the lower courts with guidance regarding the extent that they can rely on statistical evidence of racially disparate impact in enhanced penalty cases. We propose that this Court craft a test for use in enhanced penalty cases whereby if reliable and valid statistical evidence shows that the statute in question affects exclusively, or almost exclusively, a racial minority, then that evidence should constitute proof of discriminatory purpose. The burden then should shift to the state to show that the law would have been adopted regardless of that discriminatory purpose for other, constitutionally permissible, purposes and that the statute achieves its permissible purposes with the least restrictive means available.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

KIMBALL R. ANDERSON*
GERALD C. PETERSON
BRUCE R. BRAUN
MARIE A. LONA
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

MARIA WOLTJEN
CHICAGO LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER THE
LAW, INC.
185 North Wabash, Suite 2110
Chicago, Illinois 60601
(312) 630-9744

* Counsel of Record

Dated: June 22, 1994

APPENDICES

APPENDIX A

No. 75081, 75082, 75083 cons. - Agenda 8 - January 1994

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellant,

v.

R.L., a Minor,

Appellee.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellant,

v.

D.W., a Minor,

Appellee.

JUSTICE FREEMAN delivered the opinion of the court:

Section 5-4(7)(a) of the Juvenile Court Act of 1987 provides, under various circumstances, for the automatic transfer of cases of 15- and 16-year-old minors charged with drug offenses from the juvenile division of a circuit court to that court's criminal division. (Ill. Rev. Stat. 1991, ch. 37, par. 805-4(7)(a).) The question presented for review is whether this section, as applied to such minors charged with committing drug offenses on or near public housing property, denies such minors the equal protection of the laws. We hold that it does not.

BACKGROUND

On April 6, 1992, defendant D.W. was 16 years old. On that date, he was arrested and subsequently charged with delivering less than one gram of cocaine, which is a Class 2 felony. (Ill. Rev. Stat. 1991, ch. 56½, par. 1401(d).) He was also charged with performing

this act on a public way within 1,000 feet of Chicago Housing Authority property. This charge enhanced the penalty to a Class 1 felony (Ill. Rev. Stat. 1991, ch. 56½, par. 1407(b)(2)) and made the penalty nonprobationable (Ill. Rev. Stat. 1991, ch. 38, par. 1005-5-3(c)(2)(D).).

On December 22, 1991, defendant R.L. was 16 years old. On that date, he was arrested and subsequently charged with, *inter alia*, possessing 15.6 grams of cocaine with the intent to deliver, which is, by itself, a Class X felony (Ill. Rev. Stat. 1991, ch. 56½, par. 140l(a)(2)(A)) and nonprobationable (Ill. Rev. Stat. 1991, ch. 38, par. 1005-5-3(c)(2)(C)). He was charged with performing this act on Chicago Housing Authority property.

Since D.W. and R.L. were under 17 years of age at the time of these alleged offenses, they normally could not be prosecuted in the criminal division of a circuit court. However, section 5-4 of the Juvenile Court Act of 1987, sometimes referred to as the juvenile transfer statute, provides exceptions to this rule. Ill. Rev. Stat. 1991, ch. 37, par. 805-4(1).

One such exception in the juvenile transfer statute provides, in pertinent part, that juvenile court administration does not extend to a minor who was at least 15 years old at the time of the alleged offense, and who was charged with violating Section 401 of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1991, ch. 56½, par. 1401) while on residential property owned, operated, and managed by a public housing agency, or on a public way within 1,000 feet of such property. "These charges and all other charges arising out of the same incident shall be prosecuted under the Illinois Controlled Substances Act." Ill. Rev. Stat. 1991, ch. 37, par. 805-4(7)(a).

Based on this provision, D.W. and R.L. were each arraigned in the criminal division of the circuit court of Cook County. Each defendant asked the trial court to dismiss the charge against him and declare both section 407 of the Illinois Controlled Substances Act and section 5-4(7)(a) of the Juvenile Court Act of 1987 unconstitutional.

The trial court ruled that section 5-4(7)(a), as applied to 15- and 16-year-old minors charged with drug offenses committed within 1,000 feet of public housing, denied such minors the equal protection of the laws. U.S. Const., amend. XIV; Ill. Const. 1970., art. I, §2.

The State appeals directly to this court. (134 Ill. 2d R. 603.) We reverse.

DISCUSSION

This court has repeatedly noted the presumption that all statutes are constitutional. The party challenging a statute has the burden of clearly establishing the alleged constitutional violations. A court must construe a statute so as to uphold the statute's constitutionality and validity if reasonably possible. If the statute's construction is doubtful, a court will resolve the doubt in favor of the statute's validity. *People v. Shephard* (1992), 152 Ill. 2d 489, 499.

Under both the Federal and Illinois Constitutions, the guarantee of equal protection requires that the government treat similarly situated individuals in a similar manner. Equal protection prohibits the State from according unequal treatment to persons placed by a statute into difference classes for reasons wholly unrelated to the purpose of legislation. (*Shephard*, 152 Ill. 2d at 499.) However, equal protection does not preclude different treatment for like persons where there is a rational basis for so doing. *People v. P.H.* (1991), 145 Ill. 2d 209, 231; *Jenkins v. Wu* (1984), 102 Ill. 2d 468, 477.

In the present case, section 5-4(7)(a) contains a classification based on the location of the crime. A minor charged with committing a drug offense on a public way beyond 1,000 feet of public housing remains in the administration of the juvenile division of a circuit court. However, a minor charged with committing the same offense on a public way within 1,000 feet of public housing is automatically removed from a circuit court's juvenile division and is treated as an adult. Ill. Rev. Stat. 1991, ch. 37, par. 805-4(7)(a).

Strict Scrutiny

This court uses two standards of judicial review in assessing an equal protection challenge: strict scrutiny and rational basis review. This court applies strict scrutiny to certain "suspect" classifications, such as race, and to classifications that impinge on fundamental constitutional rights. A law will not survive strict scrutiny unless it is necessary to promote, and is narrowly tailored to serve, a compelling State interest. *Shephard*, 152 Ill. 2d at 500.

In the present case, the trial court subjected section 5-4(7)(a) of the Juvenile Court Act of 1987 to strict scrutiny. The trial court noted that the statutory classification, on its face, does not involve a suspect classification. However, the parties stipulated that approximately 90% of Chicago Housing Authority residents are black and less than 2% are white. The parties also stipulated that 34 transfers under section 5-4(7)(a) occurred in the circuit court of Cook County during a one-year period from August 1991 through July 1992, and that all of these minors were nonwhite.

Based on these stipulated facts, the trial court concluded that section 5-4(7)(a) has such a disparate impact on nonwhite minors as to create a *de facto* suspect classification. Based on this conclusion and, we note, without a finding of whether section 5-4(7)(a) is necessary to promote and is narrowly tailored to serve a compelling State interest, the trial court ruled that the provision violated the equal protection clauses of the Federal and Illinois Constitutions.

We initially note that the State and supporting *amicus*, the Chicago Housing Authority, assign error to the trial court's finding that the vast majority of public housing residents are people of color. Before this court, the State and the Chicago Housing Authority included in their briefs information that purports to show that public housing residents, statewide, are not all nonwhite. Defendants object and move to strike the information and references thereto from the State's and the Chicago Housing Authority's briefs.

We grant the motion to strike because we need not consider the information. Even if section 5-4(7)(a) has a racially disparate impact, we conclude that defendants have failed to prove that the legislature purposely intended to racially discriminate in enacting the provision.

It is true that the racially disparate impact of a law or policy is alone sufficient to state a claim under civil rights laws such as title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.* (1988)) or the Illinois Human Rights Act (Ill. Rev. Stat. 1991, ch. 68, par. 1-101 *et seq.*). (See *Board of Trustees of Southern Illinois University v. Knight* (1987), 163 Ill. App. 3d 289, 294; *Burnham City Hospital v. Human Rights Comm'n* (1984), 126 Ill. App. 3d 999, 1002, 1008.) However, "[t]his is not the constitutional rule." (*Washington v. Davis* (1976), 426 U.S. 229, 239, 48 L. Ed. 2d 597, 607, 96 S. Ct. 2040,

2047.) Rather, disparate impact alone is not enough to state a claim under the equal protection clause. *American Nurses Association v. State of Illinois* (7th Cir. 1986), 783 F.2d 716, 722.

The United States Supreme Court has "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. *** Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (*Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977), 429 U.S. 252, 264-65, 50 L. Ed. 2d 450, 464, 97 S. Ct. 555, 563; accord *Personnel Administrator v. Feeney* (1979), 442 U.S. 256, 272, 60 L. Ed. 2d 870, 883, 99 S. Ct. 2282, 2293.) The absence of proof of discriminatory intent forecloses any claim that the challenged official action violates the equal protection clause. (*City of Memphis v. Greene* (1981), 451 U.S. 100, 119, 67 L. Ed. 2d 769, 785, 101 S. Ct. 1584, 1596.) This court has followed this principle. *People v. Wegielnik* (1992), 152 Ill. 2d 418, 429; *People v. Adams* (1992), 149 Ill. 2d 331, 352; accord *Tucker v. United States Department of Commerce* (7th Cir. 1992), 958 F.2d 1411, 1413-14.

Defendants and a supporting *amicus*, the Illinois State Bar Association, contend that the legislature at least partly intended to racially discriminate in enacting section 5-4(7)(a) of the Juvenile Court Act of 1987. Defendants point to the stipulated facts that the vast majority of Chicago Housing Authority residents are people of color, and that every single transfer under section 5-4(7)(a) during a one-year period has been that of a nonwhite minor. Defendants argue that this racially disproportionate impact is proof of discriminatory intent.

We disagree. It is true that a discriminatory purpose can be inferred from the totality of the relevant facts, including a racially disproportionate impact. (*Washington*, 426 U.S. at 242, 48 L. Ed. 2d at 608-09, 96 S. Ct. at 2048-49.) Sometimes a clear pattern, unexplainable on nonracial grounds, emerges from the effect of a statute, even when the law is facially neutral. However, "such cases are rare." *Arlington Heights*, 429 U.S. at 266, 50 L. Ed. 2d at 465, 97 S. Ct. at 564.

A facially neutral and otherwise valid law does not violate the equal protection clause simply because the law may affect a greater

proportion of one race than of another. Disproportionate impact is relevant, but it is not the sole determinative of unconstitutional racial discrimination. Disproportionate impact alone does not trigger strict scrutiny. *Washington*, 426 U.S. at 242, 48 L. Ed. 2d at 609. 96 S. Ct. at 2049.

Defendants also contend that the foreseeability of this racially disparate impact is additional proof that the legislature intended to racially discriminate in enacting section 5-4(7)(a). Defendants posit that the legislature was "fully aware of the racial composition of public housing." Defendants further point to speeches by several legislators during the debates on this provision. These statements purportedly notified the legislature of the racially disparate impact of the provision. Defendants further note that subsequent speakers during the debates ignored these concerns. Defendants conclude that the legislature's failure to address these concerns "shows the foreseeability of the impact and discriminatory intent in the enactment of [section 5-4(7)(a)]."

We cannot accept this reasoning. Defendants cite, *inter alia*, *Feeney*, 442 U.S. at 279 nn.24 & 25, 60 L. Ed. 2d at 887, 888 nn.24 & 25, 99 S. Ct. at 2296 nn.24 & 25, for the proposition that inevitable adverse consequences support a strong inference of intent. However, this passage is immediately followed by a *caveat:*

> "But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof." *Feeney*, 442 U.S. at 279 n.25, 60 L. Ed. 2d at 888 n.25, 99 S. Ct. at 2296 n.25.

Feeney actually opposes defendants' position. The rule in *Feeney* is that "[e]ven conscious awareness on the part of the legislature that the law will have a racially disparate impact does not invalidate an otherwise valid law, so long as that awareness played

no causal role in the passage of the statute." *United States v. Frazier* (3d Cir. 1992), 981 F.2d 92, 95, citing *Feeney*, 442 U.S. at 279, 60 L. Ed. 2d at 887-88, 99 S. Ct. at 2296.

It is true that legislative debates on a statute are a proper source in determining whether a legislature had a racially discriminatory intent in enacting the law. (*Arlington Heights*, 429 U.S. at 268, 50 L. Ed. 2d at 466, 97 S. Ct. at 565.) However:

> "Statements made by members of the General Assembly in legislative debate assist in revealing the legislative intent behind a statute only when examined in the context of the debate in its entirety. 'Legislative intent' speaks to the will of the legislature as a collective body, rather than the will of individual legislators." *Morel v. Coronet Insurance Co.* (1987), 117 Ill. 2d 18, 24."

Thus, courts generally give statements by individual legislators in a floor debate little weight when searching for the intent of the entire legislative body. (*Castaneda-Gonzalez v. Immigration & Naturalization Service* (D.C. Cir. 1977), 564 F.2d 417, 424; accord *Butts v. City of New York Department of Housing Preservation & Development* (2d Cir. 1993), 990 F.2d 1397, 1405.) Such statements by themselves do not affirmatively establish the intent of the legislature. (*See Craddock v. Board of Education of Annawan Community Unit School District No. 226* (1979), 76 Ill. App. 3d 43, 52.) In the present case, we will not ascribe the views of a few legislators to the entire legislature.

We further conclude, for reasons which we will discuss later, that section 5-4(7)(a) is reasonable. After carefully reviewing the trial record, we conclude that if any inference of racial discrimination existed, it failed to ripen into proof. See *Price v. Austin Independent School District* (5th Cir. 1991), 945 F.2d, 1307, 1319.

Therefore, the trial court erred by ruling that the provision created a *de facto* suspect classification. "A law that does not implicate either a suspect classification or a fundamental right is subject to rational basis review." (*Shephard*, 152 Ill. 2d at 500; accord *Frazier*, 981 F.2d at 95.) Accordingly, we will subject section 5-4(7)(a) to rational basis review.

Rational Basis

Defendants note that crime exists statewide and not only in public housing. Thus, defendants contend, no rational basis exists for treating 15- and 16-year-old minors who are charged with committing drug offenses near public housing differently than those who are charged with committing those offenses away from public housing.

Under the rational basis test, a statutory classification need only be rationally related to a legitimate State goal. A statute must have only a rational basis for distinguishing the class to which the law applies from the class to which the law does not apply. Under this test, a court's review of a legislative classification is limited and generally deferential. The legislature, under the State's police power, has wide discretion to classify offenses and prescribe penalties for those offenses. Thus, if any set of facts can reasonably be conceived to justify the statute it must be upheld. *Shephard*, 152 Ill. 2d at 500, 502.

Further, the State may direct a law against what it considers to be a problem as it actually exists. The statute need not cover the whole field of possible abuse. The legislature may enact a law that addresses the area of concern that seems most acute. *Shephard*, 152 Ill. 2d at 502.

We conclude that a rational basis exists for the classification created by section 5-4(7)(a) of the Juvenile Court Act of 1987. The classification at issue here is based on the location of the charged offense. This is a permissible distinction. (*Shephard*, 152 Ill. 2d at 503.) What this court stated in *Shephard* concerning adults applies equally to 15- and 16-year-old minors:

> "[T]he purpose of the law was simply to deter narcotics activity in public housing, an area where the impact of this evil has been severe. Further, providing a more severe penalty for such conduct is a reasonable means of accomplishing such deterrence." (*Shephard*, 152 Ill. 2d at 503.)

Prosecuting 15- and 16-year-old minors as adults is also a reasonable means of accomplishing such deterrence. *P.H.*, 145 Ill. 2d at 231-32.

"Whether a statute is wise or unwise, and whether it is the best means to achieve the desired results, are among the matters for the legislature and not the courts." (*Shephard*, 152 Ill. 2d at 503.) As the Court noted in *Feeney*:

> "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Feeney*, 442 U.S. at 271-72, 60 L. Ed. 2d at 883, 99 S. Ct. at 2292.

Accord *P.H.*, 145 Ill. 2d at 232.

We hold that section 5-4(7)(a) of the Juvenile Court Act of 1987 does not deny 15- and 16-year-old minors, charged with drug offenses committed on or near public housing, the equal protection of the laws.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

APPENDIX B

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	CRIMINAL NUMBERS:
	)	92-CR-4907
Plaintiff,	)	92-CR-9852
	)	92-CR-9828
v.	)	
	)	
RASHAUN LAWRENCE & DEWAN WHITE,	)	Charge: POSSESSION OF
	)	CONTROLLED SUBSTANCE
Defendants.	)	

OPINION

THE COURT: The People charged Rashaun Lawrence and Dewan White with three separate, unrelated charges of delivery of a controlled substance, in violation of Chapter 56 and-a-half, Section 1401 as it relates to Chapter 56 and-a-half 1407-B-2. Both defendants are under the age of 17 and have attained the age of 15.

Illinois Revised Statutes, Chapter 56 and-a-half, Section 1407-B provides...

> "Illinois Revised Statute, Chapter 37, Section 805-4 (7)-A provides as follows:

> "The definition of delinquent minor under Section 5-3 of this Act shall not apply to any minor who at the time of the offense was at least 15 years of age and who is charged with an offense under Section 401 of the Illinois Controlled Substance Act while in a school ... or residential property owned, operated and managed by a public housing agency, on the real property comprising any school or residential property owned, operated and managed by a public housing agency. School is defined, for the purposes of this Section, as any public or private elementary or secondary school, community college, college or university. These charges and all other charges arising out of the same incident shall be prosecuted pursuant to the Illinois Controlled Substance Act."

In its continuing efforts to battle our drug crisis, the Illinois Legislature has enacted a series of acts which focus on problem areas. The first to be singled out for special attention were our schools. Then the Legislature amended the provisions of Chapter 56 1/2, Section 407-B to enlarge it to property owned by parks. Finally, enhanced penalties are set out in the Act for persons involved with public housing.

Schools are attended by all persons under the age of 16 within our society. Parks are frequented by all people living within our society. Public housing is usually limited to poor people living in our society.

The three cases at bar involve both automatic transfer of juveniles of the age of 15. The Act mandates that they be tried as adults. At the same time, the amendments to Chapter 56 1/2 mandate enhanced penalties for all people violating the provision of 56 1/2 who do so in or near public housing; i.e., "Residential property owned, operated and managed by public housing agency..."

The Illinois Supreme Court's Opinion in People versus O.C. Shephard, Docket Number 72085 has resolved the enhanced penalty issue as regards non-juveniles charged with violations of Section 407(b). The Supreme Court in that opinion discussed both the Strict Scrutiny and the Rational Basis Test. The Court determined that the Strict Scrutiny did not apply, since Chapter 56 1/2, 407(b) does not

implicate either a suspect classification or a fundamental right. The Supreme Court found that the trial court's opinion that there was no rational basis for the classification created by Section 407(b) was in error.

A review of the Shephard Opinion, however, indicates that no substantial issue of suspect classification such as race was raised. Moreover, Shephard does not concern an Automatic Juvenile Transfer. The opinion of this Court now addresses Automatic Transfer of 15 and 16 years olds and subsequent prosecution under Section 407(b).

Juveniles have been, traditionally, afforded special protection in our society. The Automatic Transfer Provision of this Act results in two significant effects on juveniles prosecuted under it:

1. They strip away the protection of the Juvenile Court Act.

2. They enhance through operation of Section 407(b), the penalty for violations committed by 15 and 16 year olds to harsher penalties, often with mandatory minimum prison sentences.

It becomes extremely important, therefore, to look at just exactly who is being affected.

This Court would note that most 15 and 16 year olds do not pick the sites of their residence; rather, it is picked for them by whatever adult, usually a parent with whom they live. While it is alleged conduct of drug violations and not the residence of the alleged offender that triggers Automatic Juvenile Transfer, the simple fact is that 15 and 16 year olds tend to do whatever it is they are going to do in their own neighborhood. This is true whether they are playing games with other children, running an errand for their mother, or abusing drugs. It is extremely unlikely that Automatic Juvenile Transfer for public housing violations will ever affect any white 15 or 16 year old from Sauganash, Bridgeport, or Arlington Heights. Fifteen and 16 year olds from white, middle class neighborhoods will be subject to neither Automatic Transfer, nor enhanced penalties.

By stipulation the parties have established the following:

(1) Less than 2% of the Chicago Housing Authority residents are white;

(2) The remaining 90+ percent are people of color, mostly African/Americans;

(3) Only 8.5% of the residents are employed;

(4) Almost all receive some form of Public Aid;

(5) EVERY SINGLE Automatic Transfer invoking the Public Housing Provision has been an Automatic Transfer of a person of color, mostly African/American.

This Court concludes that although the Statute does not disclose a discriminating racial impact on its face, the stipulated C.H.A. statistics when coupled with the stipulated fact the every single automatic transfer has been of a 15 or 16-year-old person of color, establishes that the impact of Automatic Transfer for Public Housing offenses has been exclusively borne by poor people of color. This is clearly a de facto Suspect Classification.

The floor debate in the Illinois House of Representatives establishes a clear legislative intent that only acts in public housing be affected. The penalties are not raised, nor are Juvenile Transfers mandated for 15 and 16 year olds committing the same offense, but not in public housing.

Perhaps Representative Davis says it best in these words: "Are we going to legislate a different criminal code... for those who live in public housing environments — that will be different than people that come from Elmhurst, or people that come from the north side of Chicago? Crime is crime... we cannot in this body decide that if you live in public housing and you commit a crime that your sentence will be greater than those who don't live in public housing and commit a crime..."

Perhaps, the floor debate between Representative Jones and the Bill Sponsor, Representative DeLeo best indicates the Legislature's intent:

> "JONES, S.: Why is this Bill only geared toward public housing?"
>
> "DeLEO: Well, again, this is just extending the safe school zone protection area. And why... this is... this legislation is... the intent of the Legislation is to reduce

gang activity in public housing facilities. This isn't every crime. We're talking about firearms and drugs. The same thing that's in the present Legislation, two various serious crimes. To echo Representative Homer's remarks, we're trying to produce safe housing for people, not have children induced into gangs. This Legislation deals with two parts of the law; drugs and firearms. I don't think drugs and firearms belong in any community. We have to have safe zones and we have to show that there's an increase in penalties if you're going to be caught with these illegal drugs or illegal firearms."

"JONES, S.: I understand that, but I also know by... also living in the City of Chicago that gangs are not only in public housing, they are citywide. My question again is, why is it just public housing? If you want this type of legislation, which I am against, because of... it's too... it's too broad, number one, and why is it just geared toward public housing, they're located in the entire City of Chicago."

This Court concludes that the clear statistical data from the Chicago Housing Authority, considering the fact that the Automatic Transfer Statute has resulted in the actual transfer of only people of color, when coupled with the legislative colloquy indicates a discriminatory result; if not also discriminatory purposes and intent.

This Court further concludes that the African-American opponents who spoke against this Legislation clearly sensed this but were, apparently, too polite to articulate a charge of racial discrimination.

Accordingly, the Court finds that the Legislation as it affects 15 and 16 year olds, subjecting them to Automatic Transfer is unconstitutional and violative of the equal protection clauses of 14th Amendment to the United States Constitution and the Equal Protection Provisions of the Illinois Constitution.

The motion to dismiss these charges is allowed and the matter is transferred to the Juvenile Division of the Circuit Court pending appeal.

MICHAEL BRENNAN BETTY,
JUDGE CIRCUIT COURT OF
COOK COUNTY CRIMINAL
DIVISION

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

705 ILCS 405/1-2(3)(b):

> (3) In all procedures under this Act, the following shall apply:
>
> (b) Every child has a right to services necessary to his or her proper development, including health, education and social services.

705 ILCS 405/5-4(1):

> 5-4. Criminal prosecutions limited. (1) Except as provided in this Section, no minor who was under 17 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State or for violation of an ordinance of any political subdivision of this State.

705 ILCS 405/5-4(7)(a):

> (7)(a) The definition of delinquent minor under Section 5-3 of this Act shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with an offense under Section 401 of the

Illinois Controlled Substances Act while in a school, regardless of the time of day or the time of year, or any conveyance owned, leased or contracted by a school to transport students to or from school or a school related activity, or residential property owned, operated and managed by a public housing agency, on the real property comprising any school, regardless of the tie of day or the time of year, or residential property owned, operated and managed by a public housing agency, or on a public way within 1,000 feet of the real property comprising any school, regardless of the time of day or the time of year, or residential property owned, operated and managed by a public housing agency. School is defined, for the purposes of this Section, as any public or private elementary or secondary school, community college, college, or university. These charges and all other charges arising out of the same incident shall be prosecuted under the Illinois Controlled Substances Act.